In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1010

ALLEGHENY COUNTY INSTITUTION DISTRICT
/d/b/a JOHN J. KANE HOSPITAL,
Petitioner

vs.

W. J. USERY, JR., SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ALEXANDER J. JAFFURS
County Solicitor

THOMAS H. M. HOUGH
Assistant County Solicitor
Special Labor Counsel
919 Jones Law Building Annex
Pittsburgh, Pennsylvania 15219
Attorneys for Petitioner

Financial Press Corporation, Pittsburgh

INDEX

INDEX TO APPENDIX

TABLE OF CITATIONS

In the
Supreme Court of the United States

OCTOBER TERM, 1976

No.

ALLEGHENY COUNTY INSTITUTION DISTRICT
d/b/a JOHN J. KANE HOSPITAL,
Petitioner

vs.

W. J. USERY, JR., SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Allegheny County Institution District, Defendant below (called "Kane Hospital" herein) prays that a writ of certiorari issue to review a judgment to the United States Court of Appeals for the Third Circuit entered on October 28, 1976 reversing a decision of the United States District Court for the Western District of Pennsylvania (1a). The decision of the District Court (16a) determined that Plaintiff, the United States Department of Labor (called "Labor Department" herein) failed to prove any violation by Petitioner of the Equal Pay Act of 1963, Act of June 10, 1963, 29 U.S.C.S. 206(d).

The District Court found the Labor Department failed to meet its burden of showing beauticians at Kane Hospital received lesser salaries than barbers employed there for reasons based on the sex of the beauticians, and also the

differential paid to barbers over salaries received by beauticians was a differential based on some factor other than sex.

The Third Circuit Court of Appeals reversed on the merits, and remanded for further proceedings consistent with the opinion only. It found that Kane Hospital had violated Section 6(d)(1) of the Equal Pay Act of 1963. The Court of Appeals further determined that the provisions of the Equal Pay Act, as applied to Petitioner, a public employer, were in accord with constitutional principles and that National League of Cities v. Usery, ___ U.S. ___, 96 S. Ct. 2465, 49 L. Ed. 2d, 245 (1976), did not control the issue.

OPINIONS BELOW

The following opinions are printed in the appendix to this petition:

1. Opinion by Honorable John J. Gibbons, Circuit Judge, issued by the United States Court of Appeals for the Third Circuit on October 28, 1976. (1a)
2. Opinion and Order of the District Court for the Western District of Pennsylvania, per Honorable Rabe F. Marsh, Judge. (16a)

JURISDICTION

The opinion of the Court of Appeals was issued on October 28, 1976. This petition for certiorari is filed within ninety (90) days therefrom. The jurisdiction of this court is invoked under 28 U.S.C.A. §1254(1).

QUESTIONS PRESENTED

1. Did Petitioner Kane Hospital violate any duty it owed female beauticians under the Equal Pay Act of 1963.

2. Does the Equal Pay Act of 1963 as extended to instrumentalities of the Commonwealth of Pennsylvania violate the United States Constitution.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are:

1. The Act of June 25, 1938, c. 676, §2, 52 Stat. 1060; October 26, 1949, c. 736, §2, 63 Stat. 910, 29 U.S.C.A. §202(a) and (b)
2. The Act of June 10, 1963, Pub. L. 88-38, §3, 77 Stat. 56, 29 U.S.C.A. 206(d)
3. The Act of September 23, 1966, Pub. L. 89-601, 80 Stat. 830, and
4. The Act of April 8, 1974, Pub. L. 93-259, 88 Stat. 55, 29 U.S.C.A. 203(d), (e), (h), (m), (r), (s), (t), (u), (v), (w), (x)

They read in relevant part as follows:

(1) 29 U.S.C.A. 202(a) and (b):

"(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and

with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power. June 25, 1938, c. 676 §2, 52 Stat. 1060; October 26, 1949, c. 736, §2, 63 Stat. 910."

(2) 29 U.S.C.A. 206(d):

"(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or

unpaid overtime compensation under this chapter. (4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

(3) **AN ACT**

To amend the Fair Labor Standards Act of 1938 to extend its protection to additional employees, to raise the minimum wage, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Amendments of 1966".

TITLE I—DEFINITIONS

• • • • •

DEFINITION OF ENTERPRISE

SEC. 102. (a) Section 3(r) of such Act is amended by adding at the end thereof the following: "For purposes of this subsection, the activities performed by any person or persons—

"(1) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit), or

"(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit),

shall be deemed to be activities performed for a business purpose."

(b) Section 3(d) of such Act is amended by inserting after "of a State" the following: "(except with respect to employees of a State, or a political subdivision thereof, employed (1) in a hospital, institution, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence)".

(c) Section 3(s) of such Act is amended to read as follows:

"(s) 'Enterprise engaged in commerce or in the production of goods for commerce' means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

"(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than

$250,000 (exclusive of excise taxes at the retail level which are separately stated);

"(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

"(3) is engaged in the business of construction or reconstruction, or both; or

"(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise, and the sales of such establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection."

(d) Section 3 of such Act is amended by adding after subsection (u) (added by section 103(b) of this Act) the following new subsections:

"(v) 'Elementary school' means a day or residential school which provides elementary education, as determined under State law.

"(w) 'Secondary school' means a day or residential school which provides secondary education, as determined under State law."

* * * * *

TITLE II—REVISION OF EXEMPTIONS

Hotel, Restaurant, and Recreational Establishments; Hospitals and Related Institutions

Sec. 201. (a) Section 13(a)(2) of such Act is amended by striking out everything preceding "A 'retail or service establishment'" and inserting in lieu thereof the following:

"(2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4)), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated)."

(b)(1) Section 13(b) of such Act is amended by inserting after paragraph (7) the following new paragraph in lieu of the paragraph repealed by section 211 of this Act:

"(8) any employee employed by an establishment which is a hotel, motel, or restaurant; or any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises, and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or".

(2) Section 13(a) of such Act is amended by inserting after paragraph (2) the following new paragraph in lieu of the paragraph repealed by section 202 of this Act:

"(3) any employee employed by an establishment which is an amusement or recreational establishment, if

(A) it does not operate for more than seven months in any calendar year, or (b) during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3 per centum of its average receipts for the other six months of such year; or".

• • • • •

NEWLY COVERED EMPLOYEES

SEC. 303. Section 6(b) of such Act is amended to read as follows:

"(b) Every employer shall pay each of his employees (other than an employee to whom subsection (a) (5) applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this Act by the Fair Labor Standards Amendments of 1966, wages at the following rates:

"(1) not less than $1 an hour during the first year from the effective date of such amendments,

"(2) not less than $1.15 an hour during the second year from such date,

"(3) not less than $1.30 an hour during the third year from such date,

"(4) not less than $1.45 an hour during the fourth year from such date, and

"(5) not less than $1.60 an hour thereafter."

• • • • •

TITLE IV—APPLICATION OF MAXIMUM HOURS PROVISIONS

PRESENTLY AND NEWLY COVERED EMPLOYEES

SEC. 401. Section 7(a) of such Act is amended to read as follows:

"(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any

workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

"(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this Act by the Fair Labor Standards Amendments of 1966—

"(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

"(B) for a workweek longer than forty-two hours during the second year from such date, or

"(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

• • • • •

HOSPITAL EMPLOYEES

SEC. 403. Section 7 of such Act is amended by adding after subsection (i) of such section (as so redesignated by section 204(d)(1) of this Act) the following new subsection:

"(j) No employer engaged in the operation of a hospital shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the

work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed."

• • • • •

TITLE VI—MISCELLANEOUS

Statute of Limitations

SEC. 601. (a) Section 16(c) of such Act is amended by striking out "two-year statute" and by inserting in lieu thereof "statutes".

(b) Section 6(a) of the Portal-to-Portal Act of 1947 (Public Law 49, Eightieth Congress) is amended by inserting before the semicolon at the end thereof the following: ", except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued".

Effective Date

SEC. 602. Except as otherwise provided in this Act, the amendments made by this Act shall take effect on February 1, 1967. On and after the date of the enactment of this Act the Secretary is authorized to promulgate necessary rules, regulations, or orders with regard to the amendments made by this Act.

• • • • •

(4)

AN ACT

To amend the Fair Labor Standards Act of 1938 to increase the minimum wage rate under that Act, to expand the coverage of the Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Short Title; References to Act

SECTION 1. (a) This Act may be cited as the "Fair Labor Standards Amendments of 1974".

(b) Unless otherwise specified, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the section or other provision amended or repealed is a section or other provision of the Fair Labor Standards Act of 1938 (29 U.S.C. 201-219).

Increase in Minimum Wage Rate for Employees Covered Before 1966

SEC. 2. Section 6(a)(1) is amended to read as follows:

"(1) not less than $2 an hour during the period ending December 31, 1974, not less than $2.10 an hour during the year beginning January 1, 1975, and not less than $2.30 an hour after December 31, 1975, except as otherwise provided in this section;".

• • • • •

Federal and State Employees

SEC. 6. (a)(1) Section 3(d) is amended to read as follows:

"(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization."

(2) Section 3(e) is amended to read as follows:

"(e)(1) Except as provided in paragraphs (2) and (3), the term 'employee' means any individual employed by an employer.

"(2) In the case of an individual employed by a public agency, such term means—

"(A) any individual employed by the Government of the United States—

"(i) as a civilian in the military departments (as defined in section 102 of title 5, United States Code),

"(ii) in any executive agency (as defined in section 105 of such title),

"(iii) in any unit of the legislative or judicial branch of the Government which has positions in the competitive service,

"(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

"(v) in the Library of Congress;

"(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and

"(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

"(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

"(ii) who—

"(I) holds a public elective office of that State, political subdivision, or agency,

"(II) is selected by the holder of such an office to be a member of his personal staff,

"(III) is appointed by such an officeholder to serve on a policymaking level, or

"(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

"(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.".

(3) Section 3(h) is amended to read as follows:

"(h) 'Industry' means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.".

(4) Section 3(r) is amended by inserting "or" at the end of paragraph (2) and by inserting after that paragraph the following new paragraph:

"(3) in connection with the activities of a public agency,".

(5) Section 3(s) is amended—

(A) by striking out in the matter preceding paragraph (1) "including employees handling, selling, or otherwise working on goods" and inserting in lieu thereof "or employees handling, selling, or otherwise working on goods or materials",

(B) by striking out "or" at the end of paragraph (3),

(C) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; or",

(D) by adding after paragraph (4) the following new paragraph:

"(5) is an activity of a public agency.", and

(E) by adding after the last sentence the following new sentence: "The employees of an enterprise which is a public agency shall for purposes of this subsection be deemed to be employees engaged in commerce, or in the production or goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.".

(6) Section 3 is amended by adding after subsection (w) the following:

"(x) 'Public agency' means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.".

• • • • •

(2)(A) Section 6 of the Portal-to-Portal Pay Act of 1947 is amended by striking out the period at the end of paragraph (c) and by inserting in lieu thereof a semicolon and by adding after such paragraph the following:

"(d) with respect to any cause of action brought under section 16(b) of the Fair Labor Standards Act of 1938 against a State or a political subdivision of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.".

(B) Section 11 of such Act is amended by striking out "(b)" after "section 16".

• • • • •

NURSING HOME EMPLOYEES

SEC. 12. (a) Section 13(b)(8) (insofar as it relates to nursing home employees) is amended by striking out "any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises" and the remainder of that paragraph.

(b) Section 7(j) is amended by inserting after "a hospital" the following: "or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises".

• • • • •

SUITS BY SECRETARY FOR BACK WAGES

SEC. 26. The first three sentences of section 16(c) are amended to read as follows: "The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 6 and 7 or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b), unless such action is dismissed without prejudice on motion of the Secretary."

• • • • •

EFFECTIVE DATE

SEC. 29. (a) Except as otherwise specifically provided, the amendments made by this Act shall take effect on May 1, 1974.

(b) Notwithstanding subsection (a), on and after the date of the enactment of this Act the Secretary of Labor is authorized to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act.

Approved April 8, 1974.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

1. Article I, Section 8, clause 3 — Regulation of Commerce

2. AMENDMENT X

They read as follows:

Section 8, Clause 3 — Regulation of Commerce

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

AMENDMENT X

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

This action alleged Kane Hospital breached its duties arising under the Equal Pay Act of 1963 by paying beauticians employed at Petitioner's John J. Kane Hospital $165.00 per month less than barbers employed at the same hospital.

Kane Hospital is a geriatric hospital operated by the Allegheny County Institution District, a political subdivision of the Commonwealth of Pennsylvania. (18a)

The District Court found no violation, stating the Labor Department had failed to carry its burden of proving equality of work (17a); further if the Secretary of Labor had met this burden the differential paid to barbers was on a basis other than sex. (17a-18a)

The District Court said:

> ". . .the principal criteria for pay discrimination between licensed barbers and licensed beauticians was attributable to the obvious difference in special training and, at the hospital, in dissimilar skills, efforts and responsibilities of these separate and distinct professions. These variants are factors other than sex. Accordingly, fixing wages for these different professions is a separate function performed by the County Salary Board. (tr. 97-98)." (17a-18a)

The District Court further found the Pennsylvania statutes make it unlawful for any person to practice beauty culture or to follow the occupation of barbering unless such person has obtained a certificate of registration from the Commonwealth of Pennsylvania, that barbering and beauty culture are separate occupations, and are distinctly and separately defined by such statutes. (see 17a, footnote 2)

It was established that if female barbers were hired by Kane Hospital they would receive the same salary as male

barbers and male beauticians, if hired, would receive the same salary as female beauticians. (17a, footnote 3)

The District Court found that at Kane Hospital barbers and beauticians work as separate and distinct groups with no interchangeability between them, (20a), have no common supervision, (20a), utilize different tools and techniques, (20a-21a), have different and separate duties and work performance expectations. (22a). In order to be employed as a barber or beautician each occupation requires a separate independent course of study and a separate license from the Commonwealth of Pennsylvania. (22a)

There was no showing barbers or beauticians jobs were filled or reserved for either sex. The Court of Appeals accepted the facts as found by the District Court but determined that the District Court erred in concluding the work of barbers and beauticians was not equal within the meaning of the Equal Pay Act, (9a), and found further the work performed by these two professions at Kane is substantially similar. (11a)

The Appeals Court made no findings on the interchangeability of occupations. The Appeals Court found that nothing in the Pennsylvania statutes prohibits barbers from cutting women's hair, (10a), and that such laws permit beauticians to work on men's hair. (10a) No one contested either of these facts.

The Appeals Court found the mere fact that Pennsylvania separately licenses these two occupations is not controlling and the distinction amounts to a mere difference in nomenclature. (11a)

The Appeals Court found the decision in *National League of Cities v. Usery*, ___ U.S. ___ 96 S.Ct. 2465, 49 L.Ed. 2d, 245 (1976), has no impact on the Equal Pay Act as it relates to Kane Hospital. (13a-14a) It stated the Equal Pay

Act is a separate law from the minimum wage law and was enacted to cure a different problem. (13a) It stated if the Equal Pay Act were regarded as a mere amendment to the Fair Labor Standards Act it is subject to the severability provisions of the Fair Labor Standards Act, (13a), and concluded the Equal Pay Act, as it applies to public employers such as Petitioner is unaffected by *National League of Cities*, supra. No reference was made to *Maryland v. Wirtz*, 392 U.S. 183, 20 L.Ed. 2d 1020, 88 S.Ct. 2017 (1968) as discussed and reversed in *National League of Cities*, supra.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

The Appeals Court decision has effectively reversed the findings of fact of the lower court by an incomplete use of the meaningful criteria for determining equal pay for equal work, and a conceptual misunderstanding of the congressional intent of the problem sought to be solved.

The Appeals Court failed to deal with several important findings which are central to the issue: (1) that the jobs are not interchangeable, (2) that the jobs were established as a result of state licensing requirements, and (3) that working with a similar medium does not mean the work is also equal for purposes of the equal pay act.

By failing to deal with these threshold questions and in fact assuming their insignificance, the Appeals Court turned to other issues of skill, effort, etc. which it said were not shown to be dissimilar. However, the question on these secondary issues of skill, effort, etc. cannot be dealt with absent a determination of the threshold question. Does a carpenter possess more or less skill than a cabinet maker? This question is irrelevant since no comparison of the jobs in these secondary terms is meaningful without a factual determination of the equality or lack of equality of the positions themselves.

Petitioner did not create these positions for the purpose of avoiding the requirements of the equal pay standard, but genuinely created them because of the requirements of Pennsylvania law.

Petitioner presented the testimony of experts and others familiar with the field of hair care to demonstrate that simply

working with the same medium does not mean the jobs are substantially equal for purposes of the Equal Pay Act.

Further, the failure to deal with the total lack of interchangeability between the positions in fact ignores the instructions provided by Congress to the Department of Labor, and utilized by the Department of Labor itself to examine the experience of the War Labor Board in dealing with the issue of equal pay. See: S.Rept. 176, 88th Cong. 1st Sess., to accompany S. 1409; H.Rept. 309, 88th Cong. 1st Sess., to accompany H.R. 6060 and Bulletin 800.114(b) and (c), 96 W.H.M. 583-4. Cases expressly referred to are: *Rotary Cut Box Shook Industry*, 12 War Labor Board Repts., 605, 606, 608; and *General Electric and Westinghouse Electric*, at pp. 668-9, 677, 686.

These guidelines and instructions provided by the Congress clearly show the intent that equal pay should be provided to people who are performing the same work. Minor differences in the amount or nature of the work may properly be ignored, but absent an initial showing that the work being performed is similar then it is impossible to reach other areas of comparison. The law is obviously structured in such a way, and absent a prima facie showing of sameness, the Labor Department's case must fail. (See *Corning Glass Works v. Brennan*, 417 U.S. 188, 94 S. Ct. 2223, 41 L. Ed. 1 (1974), *Hodgson v. Golden Isles Nursing Home*, 468 F.2d 1256 (C.A. 5, 1976).

If these factual comparisons are not made on these threshold issues, no value is gained from further examination of other issues. *Brennan v. Prince William Hospital Corporation*, 503 F.2d 282 (C.A. 4, 1974).

Appropriate criteria must therefore be established to determine threshold issues of sameness of occupations for the purposes of the Equal Pay Act.

The Court of Appeals has decided a federal question in such a way so as to conflict with applicable decisions of this Court.

In *National League of Cities, v. Usery, supra*, this Court made clear that the minimum wage provisions of the Fair Labor Standards Act could not be constitutionally applied to public employers, and reversed its previous holdings relating to the separate status of public schools and hospitals, (see *Maryland v. Wirtz*, supra.).

The Appeals Court has confused the value and validity of the Equal Pay Act generally with the applicability of such Act to political subdivisions of states of the United States. Petitioner herein does not question the constitutional validity of the Equal Pay Act, but the extension of such act by the Fair Labor Standards Act amendments of 1966 and 1974.

The Appeals Court indicated that if the district could point to any expression in the legislative history of the Equal Pay Act suggesting that Congress intended it to be unseverable from the Fair Labor Standards Act with respect to a specific employer it might be able, as a matter of statutory interpretation, to say that the political subdivisions of the states were intended to be exempt. However, the 1966 and 1974 amendments to the Fair Labor Standards Act are exactly what they are said to be. No one need look to the legislative history of these provisions to discover their intentions since the legislation itself is obvious. The 1966 and 1974 amendments both begin by expressly amending the Fair Labor Standards Act, which already contained Section 206(d), the Equal Pay Act. Clearly the intention of the Congress was to extend the Fair Labor Standards Act, through its commerce power as specifically expressed at 29 U.S.C.A. 202, to public employers. If the 1966 and 1974 amendments are inapplicable, *National League of Cities v. Usery, supra*, then the Equal Pay Act cannot apply to the

employers and employees newly covered by such 1966 and 1974 amendments. See *Usery v. Owensboro-Daviess County Hospital, et al.*, D C W.Ken., No. 2595-0 Dec. 13, 1976.

While the Appeals Court indicates the Congress may possess power to prohibit certain discriminatory acts by states and their political subdivisions, *Fitzpatrick v. Bitzer*, (___ U.S. ___ 96 S. Ct. 2666, 4 L. Ed. 2d. 614 (1976), no mention is made of the quite different purposes of Title VII of the Civil Rights Act nor the fact that the Fair Labor Standards Act amendments of 1966 and 1974 bring to bear the regulatory authority of the Department of Labor to charge these violations in a quite different manner, with a different group of remedies, procedures and penalties for violation. The Appeals Court, in fact, reads the Title VII purposes and Fair Labor Standards Act purposes to be a comprehensive multi agency approach to an issue. See *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970).

The Appeals Court has interpreted the purpose and value of the Pennsylvania statutes relating to the occupations of barber and beautician and has determined they in fact involve the same skills for equal pay purposes. They have acted as judges of proper pay value of employers of public institutions.

This intrusion is no less tangible than those discussed in *National League of Cities v. Usery, et al, supra.*, and for the same reasons as discussed therein are impermissible intrusions into the employer-employee relations of political subdivisions of states.

CONCLUSION

For the reasons stated above Petitioner prays this Honorable Court to grant this Petition for a Writ of Certiorari to review the issues raised herein.

Respectfully submitted,

ALEXANDER J. JAFFURS
County Solicitor
County of Allegheny

THOMAS H. M. HOUGH
Assistant County Solicitor
Special Labor Counsel
County of Allegheny
919 Jones Law Building Annex
Pittsburgh, Pennsylvania 15219
Attorneys for Petitioner

Appendix

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 76-1079

W. J. USERY, JR., SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Appellant,

v.

ALLEGHENY COUNTY INSTITUTION DISTRICT
d/b/a JOHN J. KANE HOSPITAL,
Appellee

(D. C. Civil No. 74-1153)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued September 13, 1976
Before *Chief Judge* SEITZ, ALDISERT
AND GIBBONS, *Circuit Judges*

OPINION OF THE COURT
(Filed Oct. 28, 1976)

WILLIAM J. KILBERG, *Solicitor of Labor*
CARIN ANN CLAUSS, *Associate Solicitor*
LOIS G. WILLIAMS, *Attorney*
United States Department of Labor
Washington, D. C. 20210

MARSHALL H. HARRIS,
Regional Solicitor

ALEXANDER J. JAFFURS, *County Solicitor*
THOMAS H. M. HOUGH, *Assistant County Solicitor and Special Labor Counsel*
919 Jones Law Annex Building
Pittsburgh, Pennsylvania 15219

GIBBONS, *Circuit Judge*

The Secretary of Labor appeals from a final order dismissing a suit for injunctive relief against violations of §6(d)(1) of the Equal Pay Act of 1963. 29 U.S.C. §206(d)(1).[1] The complaint alleges that the defendant Allegheny County Institution District (District), operator of the John J. Kane Hospital, has violated the act at that hospital by discriminating on the basis of sex in the wages paid to employees performing work which requires equal skill, effort and responsibility and which is performed under similar working conditions. Specifically, the complaint alleges pay discrimination between female beauticians and male barbers, who provided hair care for patients of the hospital. After a trial the district court ruled that the admitted wage differential was not a violation. The court assumed that the defendant, a political subdivision of the Commonwealth of Pennsylvania, was subject to the Act. The judgment appealed from was rendered prior to the Supreme Court's decision in *National League of Cities et al v. Usery*, 44 U.S.L.W. 4974 (U.S. June 24, 1976). On appeal the defendant urges as an additional ground for affirmance that under the tenth amendment it is exempt from the Equal Pay Act. We reverse.

[1] 29 U.S.C. § 206(d)(1) provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

I. The Violation

If the district court was correct in finding that there was no Equal Pay Act violation we would be obliged to affirm on that ground and thereby avoid a decision on the constitutional law issue tendered on appeal by the defendant's reliance on the tenth amendment. Thus we consider the issue of statutory violation first.[2]

Defendant employs three beauticians and three barbers to minister to the tonsorial and cosmetic needs of Kane Hospital's 700 male and 1300 female geriatric patients. The three barbers, all men, earn $165 a month more than the three beauticians, all women. The district court held that there was no violation of the Act because (a) the Secretary failed to prove that the work performed by the barbers and beauticians was equal, and (b) even assuming the Secretary proved that the work was equal the inequality of pay was authorized by 29 U.S.C. §206(d)(1)(iv) as a differential based on a factor other than sex. Since the parties stipulated to the wage differential and to the similarity of working conditions, the two statutory issues which were tried were "equal work" and "factor other than sex."

(a) Equal Work

The district court made a conclusion of law, designated as such, that "[t]he work performed by the barbers is substantially different than the work performed by the beauticians...and each have different skills, duties, work

[2] Hagans v. Lavine, 415 U.S. 528, 546 (1974) reaffirmed the rule of Siler v. Louisville & Nashville R.Co., 213 U.S. 175, 193 (1909) that a state statutory claim, where dispositive of the merits, be adjudicated before a federal constitutional claim. The *Hagans* Court also noted "the ordinary rule that a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." 415 U.S. at 547. We therefore review the Equal Pay Act decision before examining defendant's tenth amendment defense.

performance and responsibilities, and each exerts unequal effort in the performance of their jobs." That conclusion of law must find support in the court's findings of fact, and they in turn in the record. The district court made findings on the following:

(1) Basic work:

Women: "The female beauticians are engaged in basic hair care for female patients."

Men: "The barbers are engaged in basic hair care for the male patients."

(2) Hours:

Women: "All beauticians work from 7:30 a.m. to 3:30 p.m. Monday through Friday."

Men: "All the male barbers work from 8:00 a.m. to 4:00 p.m. Monday through Friday."

(3) Place of Work:

Women: "The work of the beauticians is divided between the floors in the women's section of the hospital and the beauty shop."

Men: "Usually in the morning, the barbers work on the floors of the hospital in the men's sections; in the afternoon one barber works in the barber shop while the other two work on the floors of the hospital."

(4) Predominant Activity:

Women: "Between 50% and 75% [of time] is spent in cutting hair...."

Men: "The skills used by the barbers are strictly barbering the hair of all the male patients

except four or five.... Hair cutting is done on the floors and in the barber shop."

(5) Additional Activities:

Women: "In addition, 25% to 50% of their time is spent in the beauty shop giving permanents, hair sets, straightening and relaxing hair. On occasion they shampoo a patient, and do nail polishing and nail filing when requested. Many of the women patients need to be shaved; the beauticians shave them with an electric razor."

Men: "They do not shave the men as a general rule. The hospital aides shave the men; on occasion the barbers will help out if there is a problem. One half to two hours every two weeks they teach the hospital aides how to shave.... They do not shampoo or manicure patients or use chemical lotions."

Both: "Both report scalp diseases to hospital nurses. Both perform their respective skills for bedridden patients and those in geriatric chairs. At the end of the day both clean their tools and do some light cleaning of their respective shops."

(6) Patient Responsibilities:

Women: "There are approximately 1300 female patients at the hospital."

• • •

"...a beautician spends thirty to forty minutes to complete a hair straightening

process, and one hour to an hour and fifteen minutes to give a hair set."

"...The responsibility of the beauticians is to cut the hair and perform additional beauty skills to the female patients who need or request their services."

Men: "There are approximately 700 male patients at the hospital.

"...barbers on the average spend ten to twenty minutes cutting the hair of a male patient...."

"...The responsibility of barbers is to cut the hair of over 700 male patients."

(7) Tools:

Women: "The tools used by beauticians are scissors, thinning shears, combs, brushes, various chemical lotions, oils and creams, clippers, bobby pins, clips, irons, rollers, and electric razors. They keep a hair dryer and heater in the beauty shop. The beauticians convey their tools to the floors on a cart."

Men: "The tools used by barbers are scissors, thinning shears, combs, a clipper, a trimming clipper and neck duster. The barbers convey their tools to the floors in a kit."

(8) Effort of Performance:

"Unlike the barbers, the beauticians use several tools in addition to the basic scissors, clippers and combs which use requires more effort of performance." (Citations to trial transcript deleted).

In view of these findings of fact on basic work hours, place of work, predominant activity, additional activities, patient responsibilities, tools, and effort, the district court erred in making the conclusion of law that the work of the barbers and the beauticians was not equal within the meaning of the statute. "Congress did not intend that inconsequential differences in job content would be a valid excuse for payments of a lower wage to an employee of one sex than to an employee of the opposite sex if the two are performing equal work on essentially the same jobs in the same establishment." 29 C.F.R. §800.120 (1974). The statutory test is "equal skill, effort and responsibility." 29 U.S.C. §206(d)(1).

The district court findings of fact establish that in the predominant activity, hair care of geriatric patients, the beauticians employ skill, effort, and responsibility at least equal to that of the barbers. To the extent that the beauticians perform additional duties they are duties involving higher skill and greater effort.

> "...where employees of opposite sexes are employed in jobs in which the duties they are required to perform and the working conditions are substantially the same, except that an employee of one sex is required to perform some duty or duties involving a higher skill which an employee of the other sex is not required to perform, the fact that the duties are different in this respect is insufficient to remove the jobs from the application of equal pay standard if it also appears that the employer is paying a lower wage rate to the employee performing the additional duties notwithstanding the additional skill which they involve." 29 C.F.R. §800.122 (1974).

The quoted regulation perfectly fits the facts found by the district court.[3] The only difference between the two jobs is that in addition to the basic task of hair care for geriatric patients the lower paid beauticians also perform cosmetic and styling tasks requiring greater skill and effort than that expended by the barbers. The basic job, skill, effort and responsibility appear to be substantially equal.[4]

Although the district court made no findings as to differences in education between beauticians and barbers, the defendant points to the evidence respecting such differences to bolster its contention that the jobs are not substantially equal. Training and education are elements of skill for the purposes of the Act. 29 C.F.R. §800.125 (1974). In this case, however, the evidence on training tends to show similarity rather than dissimilarity of skills. Both beauticians and barbers must attend 1250 hours of required schooling in not less than nine months. The curricula of the two types of schools overlap to the extent of about 75% of the subject matter. Both beauticians and barbers study haircutting, sanitation, sterilization, and the use of antiseptics, cosmetics and electrical appliances. Barbers also study honing and stropping, skills which the district court found are little used by the barbers at Kane. Beauticians study such cosmetic

[3]We recognize that the Equal Pay Act did not confer statutory authority upon the Secretary of Labor to promulgate binding regulations covering the enforcement and administration of the Act. *See* H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963), 1963 U.S. Code Cong. & Admin. News 689. Although we are not bound by the Labor Department regulations they should be given deference and presumed valid unless in conflict with the statute. Brennan v. City Stores, Inc., 479 F.2d 235, 239-40 (5th Cir. 1973).

[4]The test is not identity, but substantial equality of the jobs. *See, e.g.*, Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970); Hodgson v. Fairmont Supply Co., 454 F.2d 490, 493 (4th Cir. 1972); Ammons v. Zia Co., 448 F.2d 117, 120 (10th Cir. 1971).

skills as permanent waving, rinses, hair tinting and bleaching, wigs and hair pieces, manicuring and makeup, some of which are used at Kane. For the skills required to engage in those activities which are substantially identical at the hospital—hair care for geriatric patients—the educational background of beauticians and barbers appears to be virtually identical. Probably that identity explains why the district court did not rely on differences in training in reaching the legal conclusion that the work was unequal.

The facts found by the district court, which are amply supported by the evidence, will not support its legal conclusion that the work of barbers and beauticians at the hospital was not substantially equal. Rather those facts compel the opposite conclusion.

(b) Factor Other Than Sex

Section 6(d)(1) contains three specific and one general exception to the equal pay requirement. The specific exceptions, seniority, merit, and productivity systems, are not urged by the defendant. The general exception is for a payment made pursuant to "a differential based on any other factor other than sex." The district court made a conclusion of law that "(t)he differential is based on a factor other than sex." The opinion does not refer to any specific factor, however. Rather the court reasoned:

> Congress has not provided that when employees of one sex are members of a licensed profession unrestricted as to sex and provide more skill and effort than do employees of the opposite sex who are members of another licensed profession unrestricted as to sex, their common employer must provide equal pay.

It is not entirely clear what was intended by the quoted language. If the court meant that the fourth exception applied because the work is unequal, the reference to that

exception adds nothing. We have concluded above that beautician and barber work at the hospital is substantially equal. And to the extent that there is a difference, the higher skill is employed by the lower paid group. If what was meant is that the difference in licensing between barbers and beauticians suffices as a matter of law to justify a discrimination in wages between men and women performing equal work under the same working conditions, in the same hospital, we do not agree.

Once the Secretary showed that the work was equal the burden shifted to the defendant to show that the differential is justified by a factor other than sex. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974); *Schultz v. Wheaton Glass Co., supra*, 421 F.2d at 267. The record before us establishes that the hospital employs no male beauticians and no female barbers. Nothing in the Pennsylvania Barber License Law prevents barbers from cutting women's hair.[5] And although the Beauty Culture Act defines beauty culture in terms of women's hair,[6] the Pennsylvania Attorney General has expressed the opinion that persons licensed under that law can work on men's hair.[7] Under Pennsylvania law, persons of

[5]See 63 P.S. §551 et seq. (Purdon's 1968).

[6]Beauty Culture is defined by 63 P.S. §507 (Purdon's 1968) to include:

> any or all work done for compensation by any person, which work is generally and usually performed by hairdressers, cosmetologists, cosmeticians, beauticians or beauty culturists, and however denominated, which work is for the embellishment, cleanliness and beautification of the women's hair. . . .

[7]While Attorney General Creamer was well aware that 63 P.S. §507 limits the practice of beauty culture to women's hair, he expressed the view that that restriction was unenforceable because it was unconstitutional.

> Thus, the section of the Beauty Culture Act, by its terms, precludes males from employing the services of cosmetologists. As such it cannot stand in light of the recent amendment to the *(continued)*

either sex may be licensed in either profession, and members of either profession may serve members of either sex. As noted above, the work performed by the two professions at Kane is substantially similar. Under these circumstances, we do not regard the mere fact that the two professions are separately licensed as controlling. The distinction amounts, in this case, to a mere difference in nomenclature. As a matter of federal law, it is job content rather than job classification which controls. *See* 29 C.F.R. §800.121 (1974); *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1049-50 n.12 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 724 (5th Cir. 1970). Therefore, on the facts in this case we conclude that the mere existence of separate statutory schemes for regulating the two professions is not a 29 U.S.C. §206(d)(1)(iv) "factor other than sex."[8] For whatever other purposes the classification may be valid, it is not valid as a justification for the pay differential.

We conclude that on the facts found by the district court the Secretary has established a violation of the Equal Pay Act and that the defendant has not carried the burden of showing that it falls within one of the exceptions in 29 U.S.C. §206(d)(1).

II. The Tenth Amendment Contention

Subsequent to the district court decision, the Supreme Court in *National League of Cities v. Usery*, 44 U.S.L.W.

> Pennsylvania Constitution which provides: 'Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.' Const. Art. I, Section 27.
> 1971 Pa. Opp. Atty. Gen. No. 69, pp. 127-28

[8]We express no opinion on the relevance of state statutory classifications to §206(d)(1)(iv) in other contexts. Our holding is limited to situations where a classification is related only to job nomenclature and is unrelated to job content at a particular place of employment.

4974 (U.S. June 24, 1976) held that the minimum wage law and overtime pay provisions of the Fair Labor Standards Act[9] cannot constitutionally be applied as a regulation of interstate commerce to employees in areas of traditional governmental functions because the tenth amendment limited congressional commerce clause powers. We requested supplemental briefing upon the possible effect of *National League of Cities* because the Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56, added a sex discrimination prohibition to the existing Fair Labor Standards Act. In the supplemental briefs and at oral argument, the defendant contended that as a political subdivision of the Commonwealth it was free of the strictures of the Equal Pay Act, while the Secretary contended the Equal Pay Act was unaffected by *National League of Cities*. We conclude that the Secretary's position is correct.

We note at the outset that in *National League of Cities* the plurality opinion expressly disclaimed any intention of ruling upon the constitutionality of the exercise of Congressional authority against the states pursuant to §5 of the Fourteenth Amendment. 44 U.S.L.W. at 4979 n.17. Four days later the Court unanimously sustained the exercise of such power in *Fitzpatrick v. Bitzer*, 44 U.S.L.W. 5120 (U.S. June 28, 1976). In *Fitzpatrick* it upheld the constitutionality of the 1972 extension of Title VII of the Civil Rights Act to state and local government employers. The latter statute prohibits sex-based employment discrimination, and *Fitzpatrick* involved such a claim. Expressly referring to *National League of Cities*, 44 U.S.L.W. at 5122 n.9, the Court made it perfectly clear (1) that Congress has §5 Fourteenth Amendment power to prohibit sex discrimination in employment, and (2) that such power, despite the Tenth

[9] 29 U.S.C. §§206(a),(b)(1970 ed. Supp. V), 207(a)(1970 ed.)

Amendment, extends to the state as an employer. Thus there is a clear constitutional justification for the Equal Pay Act.

The district, however, urges that because the Equal Pay Act was housed in the Fair Labor Standards Act and utilizes the administrative and enforcement machinery of that Act it should be presumed to have been a commerce clause enactment, and should be held to fall, with the minimum wage law, as applied to political subdivisions of the states. But the Equal Pay Act is a separate law, enacted at a different time, and aimed at a separate problem — discrimination on account of sex in the payment of wages. Moreover, even if the Equal Pay Act is regarded as a mere amendment of the Fair Labor Standards Act, it is subject to the severability provision of the latter.[10] It would require an unusual extension of the power of judicial review of statutes to hold that a part of a statute plainly severable and patently justified by one source of Congressional authority fell merely because it was housed in a part of the United States Code which contained a provision lacking such justification.[11] Nor do we attach any significance to the fact that the

[10] If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby. 29 U.S.C. §219 (1970 ed.)

[11] Our Conclusion that the Equal Pay Act of 1963 was unaffected by the decision in National League of Cities et al v. Usery, *supra* compels us to clarify one point. Section 206(d)(1) refers to "employers having employees subject to any provisions of this section." State employees are subject to the provisions of §206(b). Our view of *National League of Cities, supra*, is that the states have an affirmative defense against actions brought by the Secretary to enforce §206(b) against state employers. However, the mere elimination of causes of action based on violations of §206(b) does not read that section out of the statute for all purposes. It remains the relevant cross-reference for §206(d)(1), such that any state employer who would be subject to the provisions of 29 U.S.C. §206(b), but for the holding in *National League of Cities*, remains subject to the provisions of §206(d)(1).

legislative history of the Equal Pay Act does not explicitly rely on the Fourteenth Amendment. In exercising the power of judicial review, as distinguished from the duty of statutory interpretation, we are concerned with the actual powers of the national government. If the district could point to any expression in the legislative history of the Equal Pay Act suggesting that Congress intended it to be unseverable from the Fair Labor Standards Act with respect to a specific employer we might be able, as a matter of statutory interpretation, to say that the political subdivisions of the states were intended to be exempt. There is no such expression,[12] and no room for such a construction.[13]

---

[12]See generally, H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963). S.Rep. No. 176, 88th Cong., 1st Sess. (1963), which accompanied S. 1409, the Senate's Equal Pay Bill, is not relevant insofar as the Senate bill was passed in lieu of the House bill only after the language of the latter was substituted for that of the former. 1963 U.S. Code Cong. & Admin. News 687.

[13]Those courts which have considered the contention that National League of Cities v. Usery controls on the applicability of the Equal Pay Act to state political subdivisions have rejected the contention. E.g., Usery v. Fort Madison Community School Dist., No. C 75-62-1 (S.D. Iowa, motion to dismiss denied September 1, 1976); Usery v. Bettendorf Community School Dist., No. 76-6-D (S.D. Iowa, motion to dismiss denied September 1, 1976); Usery v. Charleston County School Dist., No. 76-249 (D.S.C., motion to dismiss denied August 25, 1976); Usery v. Sioux City Community School District, No. C-76-4024 (N.D. Iowa, motion to dismiss denied August 20, 1976); Christensen v. The State of Iowa, et al., No. 74-2030 (N.D. Iowa, motion to dismiss denied August 4, 1976). *Ct.* Usery v. Board of Education of Salt Lake City, 45 U.S.L.W. 2155 (D. Utah, August 31, 1976) (Age act applies to state political subdivisions); Riley v. University of Lowell et al., Civ. No. 76-1118-M (D. Mass, age discrimination, motion to dismiss denied July 22, 1976).

Conclusion

The judgment of the district court will be reversed and the case remanded for further proceedings consistent with this opinion.

To The Clerk of The Court

Please file the foregoing opinion.

.....

Circuit Judge

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOHN T. DUNLOP,
SECRETARY OF LABOR,
UNITED STATES DEPARTMENT
OF LABOR,
Plaintiff,

vs.

ALLEGHENY COUNTY
INSTITUTION DISTRICT,
doing business as JOHN
J. KANE HOSPITAL,
Defendant.

Civil Action No. 74-1153

OPINION AND ORDER

MARSH, *District Judge*

This case arises under the Equal Pay Act of 1963, 29 U.S.C. §206(d)(1)[1] which added to §6 of the Fair Labor Standards Act of 1938 the principal of equal pay for equal work regardless of sex. It is our opinion that the action should be dismissed because the wage differential between three

[1]"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except when such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying wage rate differential in violation of this subsection shall not in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

male barbers licensed by the Commonwealth of Pennsylvania, and three female beauticians licensed by the Commonwealth, all employed by the defendant hospital, was based on factors other than sex; principally the neutral factor of hiring members of two distinct licensed professions, trained by different type schooling, and whose jobs require unequal skill, effort and responsibility. The professional differential itself, we believe is excepted under the catchall exception (iv) as "a differential based on any other factor than sex."[2]

It is established that the Secretary bears the burden of proving equality of work and unequal pay; if he sustains that burden the defendant employer has the burden of proving that the criterion for discrimination was some factor other than sex. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195-196 (1974); *Shultz v. Wheaton Glass Co.*, 421 F. 2d 259, 266 (3rd Cir. 1970).

In our opinion the Secretary failed to sustain his burden; but even if it is found that he did, the defendant employer proved that the principal criteria for pay discrimination between licensed barbers and licensed beauticians was attributable to the obvious difference in special training and, at the hospital, in dissimilar skills, efforts and responsibilities of these separate and distinct professions. These variants are factors other than sex.[3] Accordingly, fixing wages for these

[2]The Pennsylvania statutes make it unlawful for any person to practice beauty culture or to follow the occupation of barbering unless he or she shall have obtained a certificate of registration. 63 P.S. §§508, 551.

The Pennsylvania statutes contain separate and distinct definitions of beauty culture and of barbering. 63 P.S. 507-563. In effect these statutes prohibit the defendant from using its barbers as beauticians.

[3]It was established that if female barbers were hired by the defendant they would receive the same salary as male barbers, and if male beauticians were hired, they would receive the same salary as female beauticians. (Tr. 94, 112, 162-166).

different professions is a separate function performed by the County Salary Board. (Tr. 97-98).[4]

The following facts have been stipulated by the parties or found from the evidence.

This action was instituted by the Secretary of Labor, United States Department of Labor, under the provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201 et seq.), hereinafter referred to as the Act. The plaintiff has alleged that the defendant has violated section 6(d) of the Act by paying its female beauticians at lower rates than it paid its male barbers for the performance of work which required equal skill, effort and responsibility and which was performed under similar working conditions. (Tr. 3-4).

Plaintiff seeks the restraint of continued violations of the Act and further seeks to have the defendant restrained from withholding any back wages owed to its employees as a result of the aforesaid alleged violations. (Tr. 4).

The defendant, Allegheny County Institution District, maintains an office at Room 101 Allegheny County Courthouse, Pittsburgh, Pennsylvania (Tr. 4).

John J. Kane Hospital is a geriatric hospital operated by the Allegheny County Institution District, a political subdivision of the Commonwealth of Pennsylvania. (Tr. 7). The hospital is located on Vanadium Road, Scott Township, Pennsylvania.

Defendant at all times relevant hereto has employed in excess of 2,000 employees. A significant, but undetermined number of employees are regularly and recurringly engaged in interstate commerce or in the production of goods for commerce. More specifically, defendant's employees

[4]Barbers and beauticians employed in state institutions receive equal pay (Tr. 172 et seq.) (PXI).

receive, handle or otherwise work on medical and surgical equipment, drugs, foodstuffs, maintenance equipment and supplies, furniture and like items which have been received from points outside of the Commonwealth of Pennsylvania. Defendant's office employees are engaged in the receipt, preparation, and forwarding of letters, bills, invoices and like documents to or from points directly outside the Commonwealth of Pennsylvania. (Tr. 4-5).

Defendant is an enterprise engaged in commerce within the meaning of section 3(s)(4) of the Amendments to the Fair Labor Standards Act of 1966, (29 U.S.C. 203(s)(4)). (Tr. 5).

Plaintiff claims the difference between wages received by certain barbers employed by defendant and those wages received by Ann K. DeBone, Margaret Magliocca and Beatrice Adams from December 6, 1971 to the present time.

There are approximately 1,300 female patients at the hospital.[5]

All beauticians work from 7:30 a.m. to 3:30 p.m. Monday through Friday. (Tr. 53). The work of the beauticians is divided between the floors in the women's sections of the hospital and the beauty shop. Between 50% and 75% is spent cutting hair and the remaining time is spent in the beauty shop. (DXF). (Tr. 60, 116, 127). The beauticians are required to wear a uniform purchased with their own funds. (Tr. 53-54).

The female beauticians are engaged in basic hair care for female patients. (Tr. 5).

All the female beauticians are licensed by the Pennsylvania Bureau of Professional Licensing. (Tr. 5).

[5]As of August 21, 1974, there were 1,329 women patients in the hospital. (DXE).

There are approximately 700 male patients at the hospital.[6] (Tr. 5).

All the male barbers work from 8:00 a.m. to 4:00 p.m. Monday through Friday. (Tr. 13, 25). Usually in the morning, the barbers work on the floors of the hospital in the men's sections; in the afternoon one barber works in the barber shop while the other two work on the floors of the hospital. The barbers wear aprons provided by the hospital. (Tr. 26).

The barbers are engaged in basic hair care for the male patients. (Tr. 5).

All the barbers are licensed by the Pennsylvania Bureau of Licensing. (Tr. 5).

The average patient age at the hospital is 76.5 years. (Tr. 7-8).

The barbers and beauticians work as separate and distinct groups; there is no interchangeability between them; and there is no realistic common supervision. (Tr. 52, 102-103). Mr. Magliocca, the working supervisor, supervises only to the extent of seeing that the time sheets are filled in and for processing complaints. He admitted his inability to supervise the work product of the beauticians. (Tr. 103-104). He does not tell the barbers how to perform their work. (Tr. 11). He does not receive extra pay.

Beauticians and barbers are scheduled to work pursuant to the collective bargaining agreement between the County of Allegheny and Service Employees International Union. AFL-CIO-CLC. (Tr. 6-7).

The tools used by barbers are scissors, thinning shears, combs, a clipper, a trimming clipper and neck duster. The barbers carry their tools to the floors in a kit. (Tr. 15-16, 27).

[6]As of August 21, 1974, there were 727 male patients in the hospital. (DXE).

The tools used by beauticians are scissors, thinning shears, combs, brushes, various chemical lotions, oils and creams, clippers, bobby pins, clips, irons, rollers and electric razors. They keep a hair dryer and heater in the beauty shop. The beauticians convey their tools to the floors on a cart. (Tr. 55-56).

The skills employed by the beauticians are cutting and styling hair on some of the elderly women patients who do not have or want long hair. In addition, 25-50 percent of their time is spent in the beauty shop giving permanents, hair sets, straightening and relaxing hair. (Tr. 60, 82). On occasion they shampoo a patient (Tr. 60), and do nail polishing and nail filing (Tr. 179) when requested. Many of the women patients need to be shaved; the beauticians shave them with an electric razor. (Tr. 58, 73-74). The beauticians neither cut the hair nor shave the male patients.

The skills used by the barbers are strictly barbering the hair of all the male patients except four or five. (Tr. 101-102). They do not shave the men as a general rule. The hospital aides shave the men; on occasion the barbers will help out if there is a problem. (Tr. 16, 21, 30, 47, 118-119). One half to two hours every two weeks they teach the hospital aides how to shave. Hair cutting is done on the floors and in the barber shop.

The barbers are not trained to give permanents and hair sets. They are not trained to straighten hair. They do not shampoo or manicure patients or use chemical lotions. They do not cut the hair of female patients. They are not trained to cut female hair or to apply beauty techniques. (Tr. 41-42). Cutting the hair of ladies requires a substantially different skill than cutting the hair of men.

Both barbers and beauticians perform their work under similar working conditions. Both report scalp diseases to

hospital nurses. Both perform their respective skills for bedridden patients and those in geriatric chairs. At the end of each day both clean their tools and do some light cleaning of their respective shops.

The duties performed by the barbers and beauticians are different in that the occupations are different; each craft has different duties and different work performance, expectations, effort and responsibilities, as classified; each requires a special independent course of study and a separate license from the Commonwealth of Pennsylvania.

Not only do barbers and beauticians at the hospital perform different duties involving different skills, they expend different efforts in performing their different techniques. Unlike the barbers, the beauticians use several tools in addition to the basic scissors, clippers and combs which use requires more effort of performance. In addition barbers on an average spend ten to twenty minutes cutting the hair (Tr. 27) of a male patient, whereas a beautician spends thirty to forty minutes to complete a hair straightening process (Tr. 75), and one hour to an hour and fifteen minutes to give a hair set (Tr. 78). The time spent by the two crafts per patient is clearly unequal, thus requiring unequal effort in performing different work.

The responsibility of barbers is to cut the hair of over 700 male patients. (Tr. 101-102). The responsibility of the beauticians is to cut the hair and perform additional beauty skills to the female patients who need or request their services. (Tr. 66-67, 126-127). It is noted that one of the beauticians, Beatrice Adams, was off for 35 consecutive days (October 23 through December 1, 1972) and apparently it was unnecessary to hire a substitute. (DXF). The beauticians, unlike the barbers, do not have the responsibility to serve every female patient in the hospital. Female patients with long hair do not receive haircuts; not all request beauty techniques.

During the period in which violations are alleged to have occurred, the female beauticians were paid $165.00 a month less than the male barbers. (Tr. 6) (DXD).

At all times relevant, the defendant was aware of the provisions of the Act as amended.

CONCLUSIONS OF LAW

The court has jurisdiction of the parties and the subject matter of this cause of action pursuant to the provisions of the Fair Labor Standards Act of 1938; as amended. (29 U.S.C. 201 *et seq.*) (Tr. 6).

Defendant's employees, as described herein, were "engaged in commerce" and "in the production of goods for commerce" and included employees handling or otherwise working on such goods within the meaning of the Act. (Tr. 6).

Defendant is an enterprise engaged in commerce and in the production of goods for commerce within the meaning of section 3(s)(4) of the Act under the Fair Labor Standards Act Amendments of 1966 (80 Stat. 830), 29 U.S.C. 203(s)(4). (Tr. 6).

The work performed by the barbers is substantially different than the work performed by the beauticians in that each is a separate and distinct profession; each requires a special, independent course of study; each requires a separate license from the Commonwealth of Pennsylvania, and each have different skills, duties, work performance and responsibilities, and each exerts unequal effort in the performance of their jobs.

The wages paid to barbers and beauticians are not relevant to the purpose of the Act; the occupations are not substantially similar; they are two different jobs, not one job

being done by employees of both sexes, and therefore not equal within the purview of the Act.

The differential is based on a factor other than sex. See exception (iv), footnote 1.

Congress has not provided that when employees of one sex are members of a licensed profession unrestricted as to sex and provide more skill and effort than do employees of the opposite sex who are members of another licensed profession unrestricted as to sex, their common employer must provide equal pay.

The defendant is not in violation of the Act. The complaint should be dismissed and judgment entered in favor of the defendant.

ORDER OF COURT

AND Now, to-wit, this 17th day of October, 1975, after non-jury trial and due consideration of the briefs and reply briefs, IT IS ORDERED, ADJUDGED AND DECREED that the complaint of John T. Dunlop, Secretary of the United States Department of Labor, plaintiff, be and the same hereby is dismissed and judgment be and hereby is entered in favor of the defendant, Allegheny County Institution District, doing business as John J. Kane Hospital.

/s/ RABE F. MARSH
United States District Judge

cc: MARSHALL H. HARRIS, *Regional Solicitor*
JOAN M. ROLLER, ESQUIRE
U.S. Department of Labor
3535 Market Street, Room 14480
Philadelphia, Pa. 19104

THOMAS H. M. HOUGH, ESQUIRE
Department of Law, Allegheny County
919 Jones Law Annex Building
Pittsburgh, Pa. 15219

No. 76-1010

In the Supreme Court of the United States

OCTOBER TERM, 1976

ALLEGHENY COUNTY INSTITUTION DISTRICT, d/b/a JOHN J. KANE HOSPITAL, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ALFRED G. ALBERT,
Acting Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

LOIS G. WILLIAMS,
Attorney,
Department of Labor,
Washington, D.C. 20210.

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1010

ALLEGHENY COUNTY INSTITUTION DISTRICT, d/b/a JOHN J. KANE HOSPITAL, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 544 F. 2d 148. The opinion of the district court (Pet. App. 16a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1976. The petition for a writ of certiorari was filed on January 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether female beauticians and male barbers, both providing basic hair care for geriatric patients, perform work that is "equal" within the meaning of the Equal Pay Act.

2. Whether the Equal Pay Act may constitutionally be applied to States and their subdivisions.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. The pertinent provisions of the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. 206(d), are set out at Pet. 5-6.

2. The Fourteenth Amendment provides in relevant part:

> SECTION 1. * * * No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT

The Secretary of Labor brought this action in the United States District Court for the Western District of Pennsylvania to enjoin petitioner from violating the Equal Pay Act by maintaining a wage differential between the male barbers and female beauticians on its staff.

The district court found that both barbers and beauticians provided "basic hair care" for geriatric patients (Pet. App. 19a-20a). Both spent the majority of their time cutting hair, which requires use of the same basic tools (*id.* at 20a-21a). They worked the same number of hours (*id.* at 19a, 20a). Both reported scalp diseases to the nurses, and both cleaned their own tools. All barbers and beauticians attended professional schools, where they received similar training and experience; all were licensed by the State of Pennsylvania. The beauticians, unlike the barbers, also gave permanents and hair sets, straightened and relaxed hair, and shaved

patients with electric razors; they occasionally shampooed hair and polished and filed nails (Pet. App. 21a-22a). The barbers, unlike the beauticians, occasionally taught hospital aides how to shave patients (*id.* at 21a.)

Notwithstanding these findings that barbers and beauticians perform substantially identical tasks, the district court dismissed the action. It stated that barbers and beauticians were "members of two distinct licensed professions, trained by different type schooling, and whose jobs require unequal skill, effort and responsibility" (Pet. App. 17a).

The court of appeals reversed. It held that the district court's findings of fact on "basic work hours, place of work, predominant activity, additional acitivites, patient responsibilities, tools, and effort" (Pet. App. 7a) demonstrated that barbers and beauticians perform equal work within the meaning of the Act. The court of appeals concluded that the educational backgrounds and licensing requirements for barbers and beauticians were "virtually identical" (*id.* at 9a) and that, in such circumstances, the "mere fact that the two professions are separately licensed" was not significant (*id.* at 11a).

The court also held that the Equal Pay Act constitutionally may be applied to States and their subdivisions. It concluded, relying on *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, that the Equal Pay Act is supported by Congress' power under Section 5 of the Fourteenth Amendment to define and enforce the equal protection of the laws. Although the Equal Pay Act had been joined with the Fair Labor Standards Act, part of which this Court invalidated in *National League of Cities* v. *Usery*, 426 U.S. 833, the court of appeals held that the Equal Pay Act was severable and rested upon a firm constitutional footing.

ARGUMENT

The decision of the court of appeals is correct. There is no conflict among the circuits concerning the validity of the Equal Pay Act, and petitioner's remaining argument involves only the application of settled principles to the facts of this case. Accordingly, there is no need for review by this Court.

1. Petitioner contends that the court of appeals unjustifiably discarded the district court's findings of fact (Pet. 22). On the contrary, the court of appeals accepted all of the district court's findings of fact (Pet. App. 9a) and held that these findings demonstrated that the jobs of barber and beautician were substantially identical.

Petitioner argues that the jobs were not identical because state licensing procedures lead to separate licenses and because, under the licensing scheme, persons may not transfer from one job to another. But it is settled that jobs need not be interchangeable to be substantially equal; it is enough that they be closely related and require substantially equal skill, effort, and responsibility. *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 203-204 n. 24. Here, as the court of appeals observed, the district court's findings establish that the beauticians employed skill, effort, and responsibility "at least equal to that of the barbers" (Pet. App. 7a); to the extent there was any difference, the beauticians, who received the lower pay, employed the greater skill (*id.* at 10a). The Equal Pay Act therefore forbids the pay differential found to exist here.[1]

---

[1]It makes no difference that Pennsylvania has separate licensing systems for barbers and beauticians. The decision whether jobs are equal is one of federal law, and differences of nomenclature under state procedures do not matter. 29 C.F.R. 800.121; *Hodgson* v. *Behrens Drug Co.*, 475 F. 2d 1041, 1049-1050 n. 12 (C.A. 5), certiorari denied, 414 U.S. 822; *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719, 724 (C.A. 5). Nor does it make a difference that, under Pennsylvania law, men may be beauticians and women may be barbers. The fact remains that petitioner employs only female beauticians and male barbers, and that it pays barbers $165 per month more than beauticians. See Pet. App. 10a-11a, 23a.

2. Petitioner contends (Pet. 24-25) that the Equal Pay Act may not constitutionally be applied to States and their subdivisions. The argument is incorrect, and it has been rejected by the vast majority of courts that have passed upon it.[2]

a. The Equal Pay Act is an exercise of the power of Congress, under Section 5 of the Fourteenth Amendment, to enact appropriate legislation to enforce the Equal Protection Clause of Section 1 of that Amendment. This Court has held in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, that the Fourteenth Amendment worked a fundamental alteration of the allocation of power within our federal system. *Fitzpatrick* therefore sustained, against an Eleventh Amendment challenge, the power of Congress to provide for back pay as a remedy for unequal treatment on account of sex. The Equal Pay Act achieves the same objective—equal treatment without regard to sex—and is constitutional under the same grant of power to Congress. As

---

[2]District courts in 25 cases have reached the same conclusion as the court of appeals in the present case. Two district courts have agreed with petitioners. A list of the cases reaching this issue is set out for the convenience of the Court as an appendix to this brief. No other court of appeals has yet decided the issue, but cases presenting it are pending in four circuits. *Christopher* v. *Iowa*, C.A. 8, No. 76-1632; *Marshall* v. *Charleston County School* District, C.A. 4, No. 76-2340; *Usery* v. *Owensboro-Daviess County Hospital*, C.A. 6, No. 77-3069; *Usery* v. *City of Sheboygan*, C.A. 7, Misc. No. 76-8122.

the Court stated in *Ex parte Virginia*, 100 U.S. 339, 347-348, "the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete."

Petitioner argues that the Equal Pay Act must fall with the Fair Labor Standards Act, part of which this Court held unconstitutional in *National League of Cities* v. *Usery*, 426 U.S. 833. It is true that the Equal Pay Act was placed within the Fair Labor Standards Act, but that does not end the matter. The Equal Pay Act is a separately considered statute enacted in 1963. It was "enacted at a different time, and aimed at a separate problem—discrimination on account of sex in the payment of wages" (Pet. App. 13a). The Fair Labor Standards Act contains a broad severability clause (29 U.S.C. 219), and so there is no reason why the Equal Pay Act should be affected by *National League*, unless the rationale of *National League* applies here as well.

We already have discussed the most important difference between this case and *National League;* although the minimum wage and overtime provisions of the Fair Labor Standards Act were enacted under the authority of the Commerce Clause alone, the sex discrimination provisions at issue here draw support from Section 5 of the Fourteenth Amendment as well as from the Commerce Clause.

Petitioner responds that the Equal Pay Act must be assessed as if it drew its authority from the Commerce Clause alone, because Congress explicitly invoked its Commerce Clause power when enacting the statute. The court of appeals properly rejected the argument that Congress must cite the correct source of power when enacting a statute; the constitutionality of Acts of

Congress depends upon the substance of their provisions, and not whether the committee reports or the preamble contain particular invocations of authority. The procedures for the enactment of legislation specified by Article I of the Constitution do not require Congress to utilize either published legislative history or a preamble—let alone to state an accurate constitutional theory in such documents. Nothing in Article I, or elsewhere in the Constitution, authorizes a court to strike down otherwise valid legislation merely because Congress misconceived the source of its authority to enact it. "In exercising the power of judicial review * * * we are concerned with the *actual powers* of the national government" (Pet. App. 14a; emphasis added).

The proper question is "whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained." *Keller* v. *United States*, 213 U.S. 138, 147. Indeed, Title VII of the Civil Rights Act of 1964, which this Court upheld in *Fitzpatrick* as an exercise of authority under Section 5 of the Fourteenth Amendment, also purported to be only an exercise of authority under the Commerce Clause. At the time Title VII was enacted in 1964 it applied only to private persons, just as the Equal Pay Act applied only to private persons when it was enacted in 1963. There therefore would have been no basis for a congressional assertion of power under the Fourteenth Amendment, which applies only to state action. Similarly, when Title VII was made applicable to the States in 1972, and when the Equal Pay Act was made applicable to petitioners in 1966 (and to other governmental entities in 1974), there was no reason for Congress to rely heavily upon its powers under the Fourteenth Amendment. The Civil Rights Act of 1964 had been sustained as a valid Commerce Clause enactment (*Katzenbach* v. *McClung*, 379 U.S. 294), and the 1966 extension of the Fair Labor Standards Act to

governmental entities like petitioner also was sustained as a valid Commerce Clause enactment (*Maryland* v. *Wirtz*, 392 U.S. 183). The fact that *National League* now has held that reliance upon the Commerce Clause was misplaced does not mean, however, that the Equal Pay Act may not be upheld under the Fourteenth Amendment. Under our constitutional system, a court is not authorized to invalidate a statute, otherwise within the substantive powers of Congress, just to see whether Congress would re-enact the statute with a different citation of constitutional authority.

b. Moreover, the Equal Pay Act is a valid exercise of power under the Commerce Clause, without regard to its validity under the Fourteenth Amendment. *National League* did not hold that Congress lacks any power under the Commerce Clause to regulate the States; the Court specifically stated (426 U.S. at 852-855) that it was not disturbing the holdings of *Fry* v. *United States*, 421 U.S. 542, *Parden* v. *Terminal R. R.*, 377 U.S. 184, *California* v. *Taylor*, 353 U.S. 553, and *United States* v. *California*, 297 U.S. 175, all of which sustained legislation, enacted under the commerce power, regulating States in their role as employers.

The Court concluded in *National League* that the Commerce Clause does not establish sufficient authority for the federal government to interfere in certain attributes of sovereignty that the States and their subdivisions exercise in carrying out traditional functions of government. But even if the establishment of geriatric hospitals like petitioner can be portrayed as a traditional function of the States,[3] the Equal Pay Act does not interfere in any significant way with the manner in which States are permitted to carry out that function.

---

[3]But see *Parden*, *supra*.

The minimum wage and overtime provisions of the Fair Labor Standards Act set wage and hour standards that could have required the States to rearrange the way jobs were performed and to pay their employees higher wages than state statutes provided. The Equal Pay Act, by contrast, does not compel any State to pay one wage rather than another. States retain full control over the wages paid to their employees; they retain full control over the number of employees to hire for each job, and what hours they shall work. The Equal Pay Act provides only that, once the State in its sole discretion has set a wage rate for employees of one sex, it must pay the same rate to employees of the other sex doing substantially equal work. This does not impinge on state autonomy or threaten to undermine the performance by the States of any of their essential and customary functions.[4] Therefore, under the standards this Court applied in *National League*, the Equal Pay Act would be a permissible exercise of the commerce power even if it stood on that power alone.

---

[4]Indeed, States could not reasonably claim that they have an interest in paying different wages to men and women who do the same work, because such sex discrimination would violate the Equal Protection Clause of the Fourteenth Amendment. It is hard to see how a State could argue that violations of the Equal Protection Clause are an "essential attribute" of its sovereignty.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

ALFRED G. ALBERT,
Acting Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

LOIS G. WILLIAMS,
Attorney,
Department of Labor.

MARCH 1977.

DOJ-1977-03

APPENDIX

CASES DECIDED AFTER *NATIONAL LEAGUE OF CITIES* v. *USERY*, 426 U.S. 833, PASSING UPON THE CONSTITUTIONALITY OF THE EQUAL PAY ACT AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT AS APPLIED TO STATES AND THEIR SUBDIVISIONS

Equal Pay Act of 1963, 29 U.S.C. 206(d)

a. Cases upholding the Act

Christensen v. *Iowa*, 417 F. Supp. 423 (N. D. Iowa).

Usery v. *Charleston County School District*, D. S.C., No. 76-248, decided August 24, 1976.

Usery v. *Sioux City Community School District*, N.D. Iowa, No. C-76-4024, decided August 20, 1976.

Usery v. *Fort Madison Community School District*, S.D. Iowa, No. C-75-62-1, decided September 1, 1976.

Usery v. *Bettendorf Community School District*, 423 F. Supp. 637 (S.D. Iowa).

Usery v. *Berkeley Unified School District*, N.D. Cal., No. C-75-1558 SAW, decided September 27, 1976.

Usery v. *Kent State University*, N.D. Ohio, No. C75-550, decided October 6, 1976.

Usery v. *Washoe County School District*, D. Nev., No. R-75-216 BRT, decided October 13, 1976.

Usery v. *University of Nevada, Reno*, D. Nev., No. R-75-62 BRT, decided October 13, 1976.

Usery v. *Dallas Independent School District*, 421 F. Supp. 111 (N.D. Tex.).

Usery v. *University of Texas at El Paso*, W.D. Tex., No. EP-75-CA-221, decided October 14, 1976.

Usery v. *Memphis State University*, W.D. Tenn., No. C-75-54, decided October 29, 1976.

Usery v. *Baltimore County School District*, D. Md., No. K-76-762, decided November 16, 1976.

Usery v. *City of Brockton*, D. Mass., No. 76-2265-M, decided November 9, 1976.

Usery v. *Morrissey*, D. Mass., No. CA 74-2311-G, decided November 15, 1976.

Usery v. *A&M Consolidated Independent School District*, S.D. Tex., No. 74-H-1532, decided November 30, 1976.

Usery v. *Tennessee Technological University*, M.D. Tenn., No. 75-7-NE-CV, decided December 14, 1976.

Usery v. *Austin Peay State University*, M.D. Tenn., No. 75-42-NA-CV, decided December 14, 1976.

Usery v. *Kenosha Unified School District Number One*, E.D. Wisc., No. 73-C-399, decided December 13, 1976.

Usery v. *City of Sheboygan*, E.D. Wisc., No. 76-C-209, decided December 13, 1976.

Brown v. *County of Santa Barbara*, C.D. Cal., Nos. 75-3492-HP and 75-3978-HP, decided January 14, 1977.

National League of Cities v. *Marshall*, D. D.C. (three-judge court), No. 74-1812, decided January 31, 1977.

Usery v. *Eastern Kentucky University*, E.D. Ky., No. C.A. 76-15, decided January 21, 1977.

Usery v. *Council Bluff Community School District*, S.D. Iowa, No. 76-26-W, decided January 27, 1977

Usery v. *Oregon*, D. Ore., No. 74-629, decided February 12, 1977.

b. Cases holding the Act invalid

Howard v. *Ward County*, 418 F. Supp. 494 (D. N.D) (Title VII case denying Equal Pay Act jurisdiction but applying Equal Pay Act standards to afford relief to employee of county).

Usery v. *Owensboro-Daviess County Hospital*, 423 F. Supp. 843 (W.D. Ky).

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*

Cases upholding the Act

Usery v. *Board of Education of Salt Lake City*, 421 F. Supp. 718 (D. Utah).

Springer v. *City of Los Angeles*, C.D. Cal., No. CV 76-2449-FW, motion to dismiss denied November 24, 1976.

Aaron v. *Davis*, W.D. Ark., No. LR-76-C-16, motion to reconsider judgment for plaintiff denied December 9, 1976.